No. 04-1152

IN THE

Supreme Court of the United States

DONALD RUMSFELD, *et al.*,

Petitioners,

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WARRINGTON S. PARKER, III
PETER E. GRATZINGER

HELLER EHRMAN LLP
333 Bush Street
San Francisco, California 94104
(415) 772-6000

E. JOSHUA ROSENKRANZ*
SHARON E. FRASE
JEAN-DAVID BARNEA

HELLER EHRMAN LLP
120 West 45th Street
New York, New York 10036
(212) 832-8300

* *Counsel of Record*

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QUESTION PRESENTED

The Solomon Amendment commands academic institutions to distribute and post military recruiting literature, to include military recruiters in school-sponsored forums for discussion with students, to coordinate student interviews, and otherwise to disseminate and promote military recruiting messages, on pain of an across-the-board withdrawal of federal funding. This command conflicts with law schools' longstanding and evenhanded policies of refusing to abet employers that discriminate. Was the court of appeals correct in concluding that this statute should be preliminarily enjoined, as it unconstitutionally conditions funds on schools' relinquishment of their First Amendment rights?

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioners are U.S. Secretary of Defense Donald H. Rumsfeld; U.S. Secretary of Education Margaret Spellings; U.S. Secretary of Labor Elaine Chao; U.S. Secretary of Health and Human Services Michael O. Leavitt; U.S. Secretary of Transportation Norman Y. Mineta; and U.S. Secretary of Homeland Security Michael Chertoff, all in their official capacities.

Respondents are the Forum for Academic and Institutional Rights, Inc. ("FAIR"); the Society of American Law Teachers, Inc. ("SALT"); the Coalition for Equality; the Rutgers Gay and Lesbian Caucus; Pam Nickisher; Leslie Fischer; Michael Blauschild; Erwin Chemerinsky; and Sylvia Law.

Respondent FAIR, a New Jersey membership corporation, has no parent company, and no publicly held company owns stock in it.

Respondent SALT, a New York not-for-profit corporation, has no parent company, and no publicly held company owns stock in it.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

STATEMENT

Law Schools Adopt Anti-Discrimination Policies to Inculcate Values

Law schools are not just about teaching students how "to draft briefs, argue motions, depose witnesses, and close deals." J.A. 376-77.[1] They are, and have long been, institutions with a mission to inculcate a set of values in their students. App. 16a. One of the most important values law schools teach is equality—that people should be judged by their qualifications and achievements, rather than their ethnicity, their race, their gender, their sexual orientation, or any other criteria bearing no relation to merit. J.A. 308-10.

For decades, law schools have practiced the values they preached by promulgating, and abiding by, anti-discrimination policies. App. 2a-3a. In these policies, these schools declare that they will not condone any act of discrimination on their campuses and will not abet any entity that discriminates. App. 3a. Such policies direct law school personnel not to support or assist any employer that refuses to certify it has a policy against invidious discrimination. App. 2a-3a. A typical policy provides:

> [The] School of Law is committed to a policy of equal opportunity for all students and graduates. The Career Services facilities of this school shall not be available to those employers who discriminate on the grounds of race, color, religion, national origin, sex, handicap or disability, age, or sexual orientation. . . . Before using any of the Career Services interviewing

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[1] In this brief, the government's petition for writ of certiorari is cited as "Pet.," the appendix to the petition is cited as "App.," the government's brief in the court of appeals is cited as "Gov't Br.," and the joint appendix in the court of appeals is cited as "J.A."

> facilities of this school, an employer shall be required to submit a signed statement certifying that its practices conform to this policy.

App. 3a. Law schools have always applied these anti-discrimination policies evenhandedly, refusing to assist any employer that discriminates. *E.g.*, J.A. 149, 226-27.

The Government Demands an Exception

This case arose when the government demanded an exception to these policies. Because the military discriminates on the basis of sexual orientation, *see* 10 U.S.C. § 654, military recruiters for the military's Judge Advocate General ("JAG") corps cannot certify their compliance with the schools' anti-discrimination policies. Accordingly, law schools refused to assist military recruiters in their recruiting efforts and a handful denied military recruiters access to campus altogether. App. 8a-9a.

Congress responded, in 1994, with an appropriations rider, the Solomon Amendment, which denied Department of Defense ("DOD") funds to schools that denied or prevented the military "entry to campuses or access to students." National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 558, 108 Stat. 2663, 2776 (1994). The Solomon Amendment's sponsors minced no words about the statute's purpose. They derided any policy of entirely excluding the military as "a backhanded slap at the honor and dignity of service in our Nation's Armed Forces." 140 Cong. Rec. 11,441 (1994) (Rep. Pombo). While recognizing that schools have "first-amendment rights" to refuse to assist military recruiters in protest of their discriminatory hiring policies, the Solomon Amendment's main sponsor, Rep. Gerald Solomon, urged that any schools that exercised these rights should "not expect Federal Dollars to support" them. *Id.* at 11,439. By enacting the rider, the sponsors proclaimed an intention to "send a message over the wall of the ivory tower of higher education" that the schools' "starry-eyed idealism comes with a price." *Id.* at 11,441 (Rep. Pombo).

Congress made no findings that the military was having trouble recruiting lawyers, or that these provisions would materially enhance recruiting results. It never even held hearings at which any information on the subject was presented. DOD, for its part, opposed the legislation as "unnecessary, duplicative, and potentially harmful to defense research initiatives." *Id.* at 11,440 (Rep. Underwood). A similar, discretionary statute was already in place, but had rarely been invoked because the schools' anti-discrimination policies had never had any deleterious impact on military recruiting. *See id.* at 11,441-42 (Rep. Schroeder).

Congress has revised the Solomon Amendment several times since 1994, each iteration threatening ever greater penalties for schools' continued adherence to their anti-discrimination policies. Congress has expanded the penalty to encompass not just DOD funds, but funds administered by almost every other federal agency that contracts with or gives grants to academic institutions, including the Departments of Health and Human Services, Education, Labor, Transportation, and Homeland Security. 10 U.S.C. § 983(d). Congress has further expanded the penalty beyond the offending school, to cover parent universities and all their components, so that a law school's policy could jeopardize the particle accelerator or cancer research across campus. *Id.* § 983(a). But until recently, the Solomon Amendment demanded nothing but "entry to campuses" and "access to students."

Law Schools Grant the Military Access Without Providing Full Assistance in Disseminating Its Recruiting Messages

The vast majority of law schools adjusted to the Solomon Amendment, albeit at times uneasily, by accommodating military recruiters to a degree. For the most part, they allowed military recruiters to enter their campuses and have

unfettered access to their students, and provided them, often reluctantly, with some assistance in disseminating their recruiting messages. But they reaffirmed their opposition to the military's discriminatory employment policy by declining to offer them the same degree of recruiting assistance they would offer employers who did not discriminate. App. 7a.

Harvard Law School, for example, allowed military recruiters on campus, to recruit at the offices of the Harvard Law School Veterans Association, but would not volunteer its career placement personnel to arrange the interviews. App. 7a. The University of Southern California Law School invited military recruiters to interview at the ROTC offices on campus, but did not invite them to the school-sponsored job fair off campus. App. 9a.

This uneasy détente lasted some seven years. Throughout that period, military recruiting did not suffer from law schools' refusal to give the military the same exact communications support it would give other employers. App. 7a-8a. Military recruiters routinely thanked law schools for the access and assistance they were granted and marveled over banner recruiting seasons. App. 7a-8a; *see, e.g.*, J.A. 241.

The Military Demands More Assistance in Disseminating Its Messages

In late 2001, the military changed its tune. It began enforcing an unwritten policy, reflected nowhere in the statute or supporting regulations, that expanded the degree of involuntary cooperation that military recruiters demanded from law schools. App. 8a. The JAG required law schools affirmatively to "provide[] military recruiters with the same level of assistance from its career development office (arranging interviews, posting notices, *etc.*) provided to other recruiters." App. 8a; *see, e.g.*, J.A. 130-31.

Nothing less than absolute parity would suffice. Recruiters threatened penalties even for the most symbolic efforts by law schools to treat the military's recruiting messages differently from those of non-discriminating employers. They would not brook, for example, a law school's commitment to provide them every service provided to nondiscriminating employers, but to do so through associated *college* career placement staff rather than *law school* staff. J.A. 150-53. The reason the JAG offered for this more stringent policy was that any differentiation would "'send[] the message that employment in the Armed Forces is less honorable or desirable than employment with other organizations.'" App. 9a (quoting J.A. 196).

Congress Amends the Solomon Amendment to Demand that Schools Help the Military Disseminate Its Recruiting Messages as Much as They Help Non-Discriminating Employers

In October, 2004, while this case was pending before the court of appeals—and in direct response to the district court's observation that the military was reading into the law a parity requirement that did not exist, *see* App. 181a-182a—Congress amended the Solomon Amendment once more, this time to adopt the military's unwritten policy demanding the same degree of assistance in disseminating its recruiting messages. The Solomon Amendment now requires that schools provide military recruiters access to campuses and to students "for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." 10 U.S.C. § 983(b)(1).

Congress held no hearings to investigate whether military recruiting of lawyers was lagging, whether a demand for parity in affirmative support would make a difference, or whether other recruiting devices that did not trammel schools' rights might be more fruitful. This time, however, Congress did have the military's support. It came in the

form of a single letter from a DOD official. The letter did not document a need. Instead, it railed against "some colleges and universities [that] remain intransigent or outright opposed to compliance." H.R. Rep. No. 108-443, pt. 1, at 7 (2004) (reprinting Mar. 16, 2004 letter from Under Secretary of Defense David S. C. Chu). The "particularly egregious" examples it offered related not to military need, nor even to denied access, but to unwelcome protests: "[M]ilitary recruiters and prospective recruits have been forced to endure verbal abuse and harassment," at the hands of "gauntlets of taunting fellow students and faculty impeding the path" of potential recruits "to designated interview rooms." *Id.* This was the sole justification the military offered for the change requiring schools to provide full assistance in disseminating the military's recruiting messages.

Law Schools Challenge the Solomon Amendment

The Forum for Academic and Institutional Rights, a coalition of law schools and law school faculties, and the Society of American Law Teachers, filed suit along with several individual law professors, law students, and student organizations, in the U.S. District Court for the District of New Jersey. The plaintiffs filed a motion for a preliminary injunction against enforcement of the Solomon Amendment on First Amendment grounds.

The government submitted no evidence to justify its need for the Solomon Amendment, in any incarnation. App. 87a; *see also id.* at 45a. The district court declined to issue a preliminary injunction, however, concluding that the statute was not likely to be proven unconstitutional. App. 103a-184a.

The Court of Appeals Orders a Preliminary Injunction

The U.S. Court of Appeals for the Third Circuit reversed, ordering the district court to issue a preliminary injunction against enforcement of the Solomon Amendment. The court

of appeals conducted an exhaustive analysis of the First Amendment claims, and concluded, based upon the slim record before it, that the Solomon Amendment would likely not survive. App. 11a-48a. The court of appeals held that the Solomon Amendment impermissibly compels a school to use its personnel and resources to propagate the myriad messages associated with military recruiting, despite its objections to the military's exclusionary recruiting policies, App. 25a-40a; and that the Solomon Amendment burdens a school's right to expressive association by restricting its ability to teach its anti-discrimination commitment through a refusal to associate with employers whose recruiting policies it abhors, App. 15a-25a.

In the face of these intrusions on constitutional rights, the court of appeals applied strict scrutiny. The court observed that the current record contained "no evidence that would support the necessity of requiring law schools to provide the military with a forum for, and assistance in, recruiting," App. 45a, nor even "a shred of evidence that the Solomon Amendment materially enhances its stated goal," App. 24a. In fact, the court opined, it saw reason to believe that the Solomon Amendment "actually impedes recruitment." App. 24a. Moreover, the court held, "the Solomon Amendment could barely be tailored more broadly." App. 23a.

The court of appeals considered, and rejected, the government's argument that the Solomon Amendment should be analyzed under the intermediate scrutiny analysis of *United States v. O'Brien*, 391 U.S. 367 (1968), which involves regulations of conduct with only an incidental impact on expression. App. 41a-43a. But the court also examined the statute under this lower standard, and concluded that the Solomon Amendment would fail that level of scrutiny as well, due to the absence of any evidence of military need or fit between the harm supposedly targeted and the remedy chosen. App. 43a-47a.

Judge Aldisert dissented. App. 48a-81a.

Other Lawsuits

Several similar lawsuits have been brought in other districts, none of them as preliminary injunctions. *See Burt v. Rumsfeld*, 354 F. Supp. 2d 156 (D. Conn. 2005) (granting summary judgment to plaintiffs); *Student Members of SAME v. Rumsfeld*, 321 F. Supp. 2d 388 (D. Conn. 2004) (denying in part motion to dismiss; motion for summary judgment pending); *Burbank v. Rumsfeld*, No. Civ.A. 03-5497, 2004 WL 1925532 (E.D. Pa. Aug. 26, 2004) (denying in part motion to dismiss; motion for summary judgment pending). The only one of these cases decided on the merits to date has yielded a decision mirroring the Third Circuit's analysis, and a permanent injunction against the Solomon Amendment. *See Burt v. Rumsfeld*, 354 F. Supp. 2d at 174-87.

REASONS FOR DENYING THE PETITION

This certiorari petition takes an uncommon approach. In recognition of the principle that this Court is not a court of errors, most petitions argue that the case at hand presents a novel issue of law in need of this Court's guidance, even if the argument is a stretch. Not this petition. The government does not suggest that this case presents any novel issues, even arguably. As the government declares in its primary heading—"THE COURT OF APPEALS ERRED," Pet. 11 (capitalization in original)—the government's position is that the court of appeals applied standard constitutional doctrine and reached the wrong result, which is why the certiorari petition reads like a merits brief. *See* Pet. 10 (challenging opinion below as "flawed"); *id.* at 11 ("incorrect"); *id.* at 21 ("wrong").

The government, of course, does not believe that this Court should hear every case that one side or another believes is wrongly decided. So its petition boils down to the proposition that it is important to hear this preliminary injunction case now—without waiting for a factual record,

and without awaiting further percolation in the lower courts—because a preliminary injunction will harm military recruiting efforts, a proposition the court of appeals rejected as not substantiated by "a shred of evidence." App. 24a.

The Court should deny certiorari for two reasons. First, this case presents no novel issue; the court of appeals reached the right result, based upon a straightforward application of standard constitutional doctrine. In fact, it is the government's merits position that urges seismic departures from established law, on both the doctrine of unconstitutional conditions and the First Amendment. Second, review is inappropriate and unnecessary; neither the issue nor this case, in its preliminary injunction posture, is ripe for this Court's consideration, and there is no emergency to justify hearing the case at this point.

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE SOLOMON AMENDMENT VIOLATES THE FIRST AMENDMENT, AND EACH OF THE GOVERNMENT'S CHALLENGES TO THE RULING AMOUNTS TO A REQUEST TO REVOLUTIONIZE A SETTLED AREA OF LAW.

A. The Solomon Amendment Imposes an Unconstitutional Condition on a School by Threatening a Withdrawal of All Federal Funds Unless the School Relinquishes Its First Amendment Rights.

Representative Solomon described the Solomon Amendment's construct aptly: It "tell[s] recipients of Federal money . . . that if you do not like the Armed Forces['] . . . policies, . . . that is your first-amendment right[]. But do not expect Federal Dollars . . . ." 140 Cong. Rec. at 11,439. Co-sponsor Representative Pombo captured the premise more succinctly: "their starry-eyed idealism comes with a price." *Id.* at 11,441.

The price is dear for a law school's right to stand by its anti-discrimination policy and to refuse to disseminate the

military's literature and give it access to the school's forums: The government cuts off virtually every penny of federal money to the law school and to any department within the university from Astrophysics to Zoology. If a law school faculty refuses to disseminate and support the military's recruiting message, the federal government will cancel not just funding for the law school, not just funding for recruiting, not just funding for national security or defense initiatives, but *any* federal funding to anyone on campus. So when the government describes the Solomon Amendment as covering "specified public funds," Pet. 3; *see also id.* at i (Question Presented), and as covering collaborations with defense, security, and intelligence agencies, as well as "other enumerated agencies," Pet. 4, that is the government's coy way of describing a penalty that encompasses all grants and contracts under the umbrella of every department that makes grants to academic institutions, including the Departments of Education, Health and Human Services, Labor, and Transportation, 10 U.S.C. § 983(d), and the various agencies under their umbrellas, such as the Centers for Disease Control and Prevention, the National Institutes of Health, and the Food and Drug Administration, to name a few. The price tag for some academic institutions is as high as several hundred million dollars. *E.g.*, J.A. 154.

More than four decades ago, this Court announced the principle that applies to this sort of condition: In the context of civil liberties, the government cannot attach strings to a benefit to "produce a result which [it] could not command directly." *Speiser v. Randall*, 357 U.S. 513, 526 (1958). This Court has never wavered from this fundamental articulation of the doctrine of unconstitutional conditions. It has consistently reinforced the proposition that "if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

To be sure, there have been refinements over the decades. But the refinements have centered around the context where the government creates a *program* and wishes "simply [to] insist[] that public funds be spent for the purposes for which they were authorized." *Rust v. Sullivan*, 500 U.S. 173, 196 (1991); *see United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 211 (2003). Even there, this Court has constrained the government's power to control the speech that emanates from its own programs. A public university can breathe life into a school newspaper, but may not forbid it to take a religious viewpoint. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). The government may create a public broadcasting system, but may not direct it to refrain from editorializing. *See FCC v. League of Women Voters*, 468 U.S. 364 (1984). The government may create a legal services program, but may not prohibit it from taking certain positions. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

Throughout, this Court has adhered to the core principle of the doctrine of unconstitutional conditions, that the government may not "place[] a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program." *Rust*, 500 U.S. at 197 (emphasis in original). That is the principle that controls this case, for one simple reason: *There is no government program.* An entire university does not become a government program, much less a program obliged to carry the government's message, just because one of its professors or one of its departments collaborates with the government and secures federal support.

That is why the court of appeals had no trouble concluding that Congress could not condition the receipt of nearly all federal funds to an entire university on a law school's relinquishment of its First Amendment rights. *See*

App. 12a & n.9. (The district court applied the same principle, and simply reached a different result in its First Amendment analysis. *See id.* at 134a-139a.) Both courts understood that the question was whether Congress could impose the Solomon Amendment's requirements by command, for if the government could not constitutionally command compliance, then it could not penalize noncompliance by revoking millions of dollars of federal funding.

The government understood it, too. The government did not even suggest to the court of appeals—as it does to this Court—that the constitutional strictures were relaxed because "the Solomon Amendment is a condition on federal funding, and not a direct regulatory requirement." Pet. 21. To the contrary, the government acknowledged that "the scope of Congress's authority under the Spending Clause is not without limits, and one of the limits is the unconstitutional-conditions doctrine," which "prevents the government from requiring acceptance of an otherwise unconstitutional burden on expression as the price of federal funding." Gov't Br. at 44. True to the doctrine, the government addressed only the question whether "the burden imposed on [plaintiffs'] First Amendment interests is itself unconstitutional." *Id.*

The government now insists "[t]hat conclusion . . . is wrong," Pet. 21, and constructs much of its petition around the opposite view. *See* Pet. 3, 8, 10, 14-16, 20-22. According to the government's current position, the doctrine does not apply to a situation in which a private party has "voluntarily chosen to enter into grant agreements or contracts with the United States and to accept funds under them." Pet. 15 (emphasis omitted). As the government sees it, federal funds with strings attached are no different from any "contract" between private parties, in which one party makes demands which are "not justified," and the other party has the "option . . . to decline." Pet. 29.

That may have been a plausible position half a century ago. But the current law is that the government is an exception to the adage that whoever pays the piper calls the tune: "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise." *Velazquez*, 531 U.S. at 547. The government cannot blink away the entire doctrine simply by writing a 26-page petition that never once utters the phrase "unconstitutional conditions" nor even acknowledges the doctrine that bears that name.

In short, in holding that when constitutional rights are at stake, a penalty is to be treated the same as a command, the court of appeals merely applied the standard rule to an especially harsh penalty—a university-wide cutoff of all federal funds—which appears to be the single most draconian condition on rights this Court has ever confronted.

B. The Solomon Amendment Interferes with a School's Exercise of Its First Amendment Rights.

1. *The Solomon Amendment Violates the Doctrine of Compelled Speech by Forcing a School to Propagate, Accommodate, and Subsidize the Speech of Military Recruiters.*

This is what the Solomon Amendment demands on behalf of military recruiters: Distribute our brochures. Post our literature on your bulletin boards. Email your students about our imminent arrival. Maintain our announcements in your binders for students to review. Include our listing in your printed catalogs of career opportunities. Introduce us to individual students and coordinate logistics of where and when we can talk with them. Lend us interview rooms, where we can converse with students and tell them why they should join us. Reserve for us tables at information fairs where we can post "JAG Corps" banners and persuade students to join our ranks. *See* App. 27a-28a, 35a.

The court of appeals understood that these commands entailed co-opting an unwilling speaker to help disseminate the government's message, and demanding for government spokespersons a place in a school's private forum. For over 60 years, this Court has reiterated, in numerous different contexts, that, as the court of appeals put it, the government may not compel a private party to "propagate, accommodate, [or] subsidize" an unwanted message. App. 27a; *see United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

If, as this Court has held, the government cannot compel a private company to include an unwanted government-endorsed message in the envelope bearing its monthly bills, *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 12-16 (1986) (plurality opinion), then the government cannot force a private university to disseminate its literature either. If a state cannot force motorists to display a state motto on their license plates, *Wooley v. Maynard*, 430 U.S. 705, 717 (1977), then the government cannot force a private institution to display the military's literature on its bulletin boards. If the government may not force a parade organizer to include an unwanted contingent bearing "a message it did not like," *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 574-81 (1995), then the government may not force a private forum to admit an unwanted contingent of recruiters to unfurl its banner at an information fair. If the government may not force mushroom farmers to contribute a penny per pound to a fund supporting generic advertising that promotes their products, *United Foods*, 533 U.S. at 408-09, and cannot force non-union members to pay a few dollars to support the political activities of unions, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233-35 (1977), then the government may not command that a private law school expend its resources promoting a recruiting message that it finds deeply offensive. Far from being a novel application of these precedents, the court of appeals' holding was virtually foreordained.

The government scarcely grapples with any of these precedents. Instead, it purports to offer several grounds on which to distinguish this case. But the doctrine is so old, and the circumstances in which it has been applied so varied, that every distinction the government offers has already been considered—and rejected—by this Court numerous times.

First, the government argues that the military "does [not] ask the institutions to adopt the statements made by military recruiters as their own," Pet. 10, that law schools will not be mistaken as endorsing the military's message, Pet. 13, and that they are "free to protest the military's policies," Pet. 10; *see also id.* at 15 (citing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980)). As the court of appeals explained at length, these have never been defenses to a compelled-speech claim. *See* App. 36a-39a. The offended motorist was not forced to adopt the state motto as his own, *see Wooley*, 430 U.S. at 715, and (as noted in the dissent) no one would ever have mistakenly viewed him as endorsing it, *id.* at 719-22 (Rehnquist, J., dissenting); and the utility company was not forced to adopt the literature enclosed in its billing envelopes as its own and was free to protest it, *Pac. Gas & Elec.*, 475 U.S. at 15 n.11. Yet, this Court found these forced messages unconstitutional, observing that it was constitutionally irrelevant that the speaker can "tailor [his other] speech to [the government's] agenda," or issue a disclaimer that "avoid[s] giving [listeners] the mistaken impression that [the government's] words are really those of [the speaker]." *Id.* at 10, 15 n.11; *see also id.* at 12 & n.8.

Second, the government contends that its recruiting message is not, in fact, "antagonistic" to the law schools. Pet. 14-15 (citing *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 470-71 (1997)). Initially, there is no such requirement where, as here, private citizens take the position that they are being forced to disseminate messages they do not wish to disseminate. That is why this Court held, for example, that PG&E could assert a blanket right to resist the

government's command to put *any* message into its billing statements (without parsing each proposed message for antagonistic views), *see Pac. Gas & Elec.*, 475 U.S. at 14-15, and why a worker can refuse to support *any* political activities by a union (without having to specify which were antagonistic), *see Abood*, 431 U.S. at 235.

But even if there were an antagonism requirement, it would easily be met in this case, especially in light of this Court's observation that even a "disagreement [that] could be seen as minor" is constitutionally significant. *United Foods*, 533 U.S. at 411. If, as this Court has held, the courts must defer to a mushroom grower's claim that advertisements generally promoting mushrooms are antagonistic to its interest in promoting the message that its brand is superior, *id.*, then any threshold showing of antagonism must be low indeed, and the law schools easily meet it. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000).

The Solomon Amendment forces the law school to violate its own policy and actively support military recruiters who come onto campus to engage in the very discriminatory hiring practices that the law school condemns. That is true whether or not the interview ever turns to "Don't Ask, Don't Tell." But certainly, when the recruiter at a law school information fair tells a law student, "Sorry, Son, it doesn't matter how smart you are, you are ineligible to serve your country as a lawyer, because you are gay," *see* J.A. 107, he is doing more than "simply report[ing] an objective fact about the qualifications for military service," Pet. 15. He is propagating a message of discrimination, and he is doing it in a forum sponsored by an institution that has foresworn any support for those who discriminate. That is the very definition of antagonism.

Even the government's diluted rendering of the resulting message—that schools are forced merely to "convey . . . the message that the law school *treats* [all] prospective employers equally," regardless of whether they discriminate

or not, Pet. 14 (emphasis in original)—contradicts the law school's stated stance. As the court of appeals understood, the law school's position is that discrimination is intolerable, and it will never actively abet an employer who discriminates. App. 32a-33a. The lesson the law school wants to inculcate is that employers who discriminate should *not* be treated the same as those who do not.

Third, the government asserts that speech is not "compelled" here, because the requirement is couched in terms of a condition rather than a command. Pet. 15-16. This is just another version of the unconstitutional conditions argument, this time presented as the position that the doctrine applies only to suppression cases, but not to compulsion cases. But this Court has always treated compelled speech as the flip side of the same First Amendment coin. *See Wooley*, 430 U.S. at 714; *Hurley*, 515 U.S. at 573. The doctrine of unconstitutional conditions is no exception. Indeed, the doctrine was born in the context of a compelled speech case: The government tied a tax benefit to a veteran's willingness to sign a loyalty oath. *Speiser*, 357 U.S. at 514-15. No one commanded the veteran to affirm his loyalty; it was required only if he wanted the extra few dollars. The compulsion was unconstitutional there, and it is here.

2. *The Solomon Amendment Infringes on a School's Right of Expressive Association by Forcing It to Associate with Military Recruiters Who Engage in Discriminatory Practices the School Abhors.*

In holding that the Solomon Amendment violates a law school's right of expressive association, the court of appeals correctly identified the tension between the law school's expressive right and the forced accommodation of, and support for, the military's recruiting activities on campus: "The [law] schools believe that, by coordinating interviews and posting and publishing recruiting notices of an employer who discriminates on the basis of sexual orientation, they

impair their ability to teach an inclusive message by example." App. 16a-17a. The court of appeals understood that it had to "'give deference to an association's view of what would impair its expression,'" App. 20a (quoting *Dale*, 530 U.S. at 653), and found ample reason to follow that rule here.

This holding, too, was far from novel. As the court of appeals explained at length, it flowed directly from this Court's rulings on expressive association, most recently *Boy Scouts of America v. Dale*, and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*.

In *Dale*, the Boy Scouts asserted a right to exclude a gay assistant scoutmaster, despite an anti-discrimination law prohibiting the discharge. 530 U.S. at 656. This Court upheld the Scouts' right to exclude the scoutmaster, because they claimed the forced inclusion of the scoutmaster interfered with their ability to teach their moral values both directly and by example. *Id.* at 648. His "presence in the Boy Scouts," this Court held, "would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id.* at 653. This Court found a constitutional violation even though the scoutmaster had never used his position to advocate or teach any lesson that varied from the core Scouts curriculum. *Id.* at 688-93 (Stevens, J., dissenting).

In *Hurley*, the organizers of a St. Patrick's Day parade wanted to exclude a contingent of marchers that wished to carry a gay pride banner conveying "a message [the organizers] did not like." 515 U.S. at 574. They, too, confronted an anti-discrimination law. This Court found that the organizers had a First Amendment right to reject the contingent, even though they had never conceived of the parade as transmitting any particular message and they had no set criteria for participation in the parade. *Id.* at 562.

As the court of appeals concluded, these cases leave no doubt that the Solomon Amendment violates the law schools' rights of expressive association. App. 15a-22a. Law schools have established an even stronger right to exclude the unwelcome messenger from their forum than either the parade organizers or the Boy Scouts. Unlike the parade organizers, the law schools had formally articulated their policy and measured every participant by it. Unlike the offending messenger in *Dale*, the offending messenger here comes on campus to articulate the very message and engage in the very act (of discrimination) that the law schools object to. Unlike both cases, here the government is forcing the expressive association not only to tolerate the message, but to help disseminate it affirmatively.

Once again, the government's main argument is that the right must be narrowed, and once again it offers a narrowing construction that this Court has rejected. The government suggests that that doctrine is inapplicable here, because "the Solomon Amendment . . . does not establish criteria for the selection of administrators, faculty, or students," and "[r]ecruiters are not part of the institution itself and do not become members through their recruiting activities." Pet. 11-12. This taxonomy fails to account for *Hurley*, which had nothing to do with membership, but, like this case, was purely about the forced inclusion of a speaker with whom the sponsor of a forum did not want to associate. *See* 515 U.S. at 572-73.

Similarly off base is the government's repeated assertion that "the Solomon Amendment simply seeks to put military recruiters in the same position as other employers." Pet. 13. As a factual matter, that is false: No other employer can enjoy a law school's recruiting assistance without certifying that it does not discriminate. As a matter of doctrine, the right to resist a government-compelled association does not depend upon whether the resisting institution is otherwise choosy. *See Hurley*, 515 U.S. at 574.

Finally, contrary to the government's claim, there is nothing in this Court's *anti*-discrimination jurisprudence that justifies a requirement that private institutions accommodate and support *discrimination*. *See* Pet. 12, 23-24. In the anti-discrimination cases, such as *Grove City College v. Bell*, 465 U.S. 555 (1984), and *Bob Jones University v. United States*, 461 U.S. 574 (1983), this Court upheld laws that allocate federal funds only to schools that afford their students equal educational opportunities without regard to race, gender, and other forms of invidious discrimination. These cases came out the way they did because the government's compelling interest in combating discrimination outweighed any constitutional right an institution might claim to engage in invidious discrimination. *See Bob Jones Univ.*, 461 U.S. at 604. Indeed, the Court invoked cases dating back some 40 years, recognizing that providing material assistance to an institution that discriminates is itself a constitutional violation. *See id.* at 593-94 (citing *Norwood v. Harrison*, 413 U.S. 455 (1973)).

The government's justification for the Solomon Amendment is obviously not that it has a compelling interest in combating discrimination by private institutions, nor that it has a compelling interest (indeed, a constitutional duty) to ensure that federal funds do not support bigots. Here it is the government that is discriminating and the private institutions that resist abetting. The government's justification is that it needs to co-opt law school mechanisms of communication and personnel to advance its own recruiting messages. *E.g.*, Pet. 18. That justification must be addressed on its own merits—and it will be, *see infra* at 26—but no amount of verbal gymnastics can convert the Solomon Amendment from a statute designed to promote the military's exclusionary recruiting message into some sort of anti-discrimination law designed to "secure equal access to employment opportunities for . . . students." Pet. 12.

C. The Solomon Amendment's Infringements on Speech and Associational Rights Fail Constitutional Scrutiny.

1. *The Solomon Amendment Is Subject to Strict Scrutiny.*

Because the Solomon Amendment requires law schools to disseminate the government's message, and requires them to suspend their expressive policies of not hosting or abetting discriminating employers, the court of appeals correctly applied strict scrutiny. App. 22a-24a, 39a-40a; *see Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1996). The government does not suggest for a moment that the Solomon Amendment would survive strict scrutiny. Instead, it renews its argument that intermediate scrutiny applies under *United States v. O'Brien*, 391 U.S. 367 (1968), an argument the court of appeals correctly rejected. App. 41a-43a.

The federal law at issue in *O'Brien* was directed at anyone "who . . . knowingly destroys" or "knowingly mutilates" a draft card. 391 U.S. at 370. The purpose of the prohibition against destroying a draft card, this Court observed, was to ensure that eligible men always had their draft cards at the ready, *id.* at 378-80, and the penalty applied whether the card's holder privately tossed it in the incinerator or burned it publicly in protest, *id.* at 376, 378. In the latter context, the Court acknowledged, the law had an incidental effect on speech. *Id.* at 376. But the law on its face was not directed at speech, *id.* at 375, and its focus was on the destructive conduct, on a purpose that was unrelated to expression, *id.* at 379-80. The Court has since etched these two elements in doctrine as prerequisites to the application of *O'Brien*'s intermediate scrutiny standard for laws regulating conduct. *See Spence v. Washington*, 418 U.S. 405, 414 n.8 (1974); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994).

The court of appeals correctly concluded that this test is not applicable to the Solomon Amendment. App. 41a-43a. It invoked *Dale*'s analysis that when the law in question "'directly and immediately affects associational rights, in this case associational rights that enjoy First Amendment protection[,] . . . *O'Brien* is inapplicable.'" App. 43a (quoting *Dale*, 530 U.S. at 659); *see also Wooley*, 430 U.S. at 713 & n.10 (holding that the compelled-speech doctrine, and not the *O'Brien* analysis, is the "more appropriate First Amendment ground[]" to examine the compulsory display of state motto on license plates).

Moreover, as the court of appeals understood, the Solomon Amendment is directed purely at expression. App. 27a-29a. The statute does not demand that schools provide the military access to campus and affirmative support to search for bombs or to root out terrorists. It demands the schools' support "for recruiting." App. 2a. That purpose is not "unrelated to expression," *Spence*, 418 U.S. at 414 n.8; it *is* expression. App. 28a ("[R]ecruiting necessarily involves 'communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes'—the hallmarks of First Amendment expression." (quoting *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980))). While it is possible to incinerate a draft card or commit "arson of a government building," Pet. 17, without expressing a thing, it is impossible to "recruit" without a message. By definition, as the government acknowledges, "recruiters speak for the employers they represent." Pet. 13.

When the government repeatedly defines the "conduct" in question as the "denial of equal access to military recruiters," Pet. 16; *id.* at 22 (same), it elides the critical fact that what the military demands "access" to are the school's forums and vehicles of communication. The military demands "equal access" to bulletin boards, mail boxes, email systems, printed catalogs, and information fairs, only in the

same sense that a candidate demands "equal access" to an op-ed page, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 243-44 & n.1 (1974), an advocacy group demands "access" to a utility's billing envelopes, *Pac. Gas & Elec.*, 475 U.S. at 14-15, or a gay pride contingent demands "equal access" to a parade, *Hurley*, 515 U.S. at 561. To say that "[t]here is nothing inherently communicative about [this] conduct," Pet. 16, is like saying there is nothing inherently belligerent about a punch. The government's definitions of "communication" and "conduct" defy not just the English language but decades of precedent.

2. *The Solomon Amendment Cannot Survive Strict Scrutiny or Intermediate Scrutiny.*

The government's whole *O'Brien* discussion is academic anyway, because the court of appeals correctly found that the Solomon Amendment would fail even intermediate scrutiny. Intermediate scrutiny demands not just that the governmental interest be "important," but also (1) that the statute or policy actually "further[]" the interest; and (2) that "the incidental restriction on alleged First Amendment freedoms [be] *no greater than is essential* to the furtherance of that interest." *O'Brien*, 391 U.S. at 377 (emphasis added).

There is no question that government's interest in raising an army is important, even compelling, *see* U.S. Const. art. I, § 8, cl. 12; and so, too, we can presume, is its interest in hiring JAG lawyers. But under either standard of review, the government cannot "simply posit the existence of the disease sought to be cured." *Turner*, 512 U.S. at 664 (plurality opinion) (citation omitted); *see Rostker v. Goldberg*, 453 U.S. 57, 89 (1981) (Marshall, J., dissenting) ("[T]he phrase 'war power' cannot be invoked as a talismanic incantation to . . . remove constitutional limitations safeguarding essential liberties." (citation omitted)). "It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner*, 512 U.S. at 664 (plurality opinion).

These standards apply with equal force "when [Congress] acts in the area of military affairs." *Rostker*, 453 U.S. at 67; *cf. Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (military powers of the Executive do not supersede constitutional protections for individual rights).

As the court of appeals observed, faced with the requirement of *proving* that the Solomon Amendment is necessary to further the asserted interest, the government came up empty-handed. "The Government . . . failed to proffer a shred of evidence" that the military needs to force its way into private forums—much less co-opt others to disseminate its message—in order to recruit lawyers effectively. App. 24a. The government did not offer the district court even a single affidavit attesting to the special need that warrants an intrusion on liberty, much less the sort of evidence that can satisfy a court "that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." *Turner*, 512 U.S. at 666. Instead, the government argued, as it does now, that it did not need to produce a shred of evidence because the proposition is "common sense." Pet. 19.

Common sense does not prove that there was an attorney recruiting problem the military needed to solve, especially in the face of a record that demonstrates the opposite. From the DOD's opposition to the statute in the first instance, *see* App. 91a-92a & n.2 (quoting 140 Cong. Rec. at 11,440-41), to the effusive thanks of top JAG officers who for years were admitted on campus, but denied absolute parity in treatment, *see* J.A. 130, 234-35, to the military's reports of the glut of highly qualified applicants even when many schools were denying it affirmative assistance, *see* App. 7a-8a; *id.* at 99a-100a, the military, itself, has furnished ample evidence that the incursion on First Amendment freedoms was never necessary to recruit qualified lawyers.

Nor does common sense prove that the Solomon Amendment would address any such problem. As the court

of appeals suspected, "the Solomon Amendment, which has generated much ill will toward the military on law school campuses, actually impedes recruitment." App. 24a (footnote omitted). "In this context," the court of appeals concluded, "it is hardly 'common sense,' as the military alleges, that its presence on campus amidst such commotion and opposition has aided its recruitment efforts." App. 46a.

Common sense also does not prove that the various alternative recruiting methods the military has at its disposal would be inferior. The military can make use of its access to student names and address information, 10 U.S.C. § 983(b)(2), and send them recruiting materials directly. It can participate in recruiting events and symposia not sponsored by law schools, or conduct its own. The military can offer irresistible financial incentives to potential recruits, in the form of loan repayment and tuition remission, and can purchase media advertising (as it already does) on a scale that is beyond the capacity of virtually any other employer. App. 23a. As the court of appeals noted, these other approaches "might actually fare better than the current system," App. 24a, which is why the court of appeals concluded that "the Solomon Amendment could barely be tailored more broadly." App. 23a.

Apart from common sense, the government offers two other purported substitutes for record evidence. First, the government argues that "to the extent anything more than common sense is required to support" the Solomon Amendment, "Congress's judgment in enacting the funding condition furnishes that support." Pet. 19. But the government is incorrect when it purports to find in the mere fact of the enactment a "judgment that a crucial component of an effective military recruitment program is equal access to college and university campuses." Pet. 9. Since Congress failed to promulgate any legislative findings of fact, or even to hold hearings by which to ascertain facts, no such judgment can be gleaned from the enactment of the Solomon

Amendment. *Cf. United States v. Morrison*, 529 U.S. 598, 614 (2000) (even "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of . . . legislation"). It is more likely that Congress was responding to the imperative to fire a shot "'over the wall[s] of the ivory tower,'" App. 5a (quoting 140 Cong. Rec. at 11,441), than to any assessment of military need.

Second, the government tries to escape its burden by asserting that "the Solomon Amendment relies on the educational institutions' own assessments of what is *required* for effective recruiting on their campuses." Pet. 18 (emphasis changed). When law schools choose to expend their scarce resources to promote certain employers, that is not a judgment of what is "required" for any particular employer to recruit effectively, and it certainly is not a judgment of what assistance is "integral" to an extraordinarily well-financed military. Pet. 18. It is simply a judgment to associate with, and promote, one group of employers and not another. That judgment cannot support the government's demand for like treatment any more than a newspaper's judgment to allot editorial space to some candidates entitles others to insist that equal space is "required." *See Tornillo*, 418 U.S. at 256-57.

II. IMMEDIATE REVIEW IS INAPPROPRIATE AND UNNECESSARY.

Beyond the absence of any cert.-worthy issue, there are other reasons to deny review, and no compelling reason to grant it.

First, the Third Circuit was the first court of appeals to examine the constitutionality of the Solomon Amendment. Other circuits have not yet had an opportunity to address the issue. In particular, the Second Circuit will presumably hear an appeal of a permanent injunction imposed by the District of Connecticut. Another case may well be on its way to the Second Circuit shortly. And a fourth case, pending in the

Eastern District of Pennsylvania, could present the Third Circuit with another opportunity to consider the case on a fuller record. *See* cases cited *supra* at 8. As the issue percolates, review could be obviated because the courts of appeals may agree that the Solomon Amendment is unconstitutional. *See* Sup. Ct. R. 10(a); *Miroyan v. United States*, 439 U.S. 1338, 1338-39 (1978) (Rehnquist, J., in Chambers).

Second, this case does not present a suitable vehicle for review. All preliminary injunctions are preliminary—but this one is even more so than usual. As we have seen, "[t]he Government . . . failed to proffer a shred of evidence that the Solomon Amendment materially enhances its stated goal." App. 24a. Nor did the government proffer a shred of evidence to demonstrate that Congress was addressing an actual recruiting problem in the first place. App. 45a.

The government has hinted at an excuse, that it had only a week to respond to the preliminary injunction motion. Pet. 6. In truth, nearly seven weeks elapsed between the filing of the preliminary injunction motion and the district court's decision, during which time the government did not hesitate to supplement its various responses. So it is debatable whether the slimness of the evidentiary record is attributable to the preliminary nature of the proceeding or to a more fundamental reality that the justification is unprovable. What is not debatable is that the government has the information by which both parties can test the truth of its assertions of need. But that evidence will not be presented or assessed until the next phase of the litigation progresses.

Typically, these attributes compel a denial of certiorari. The government would have to make an extraordinary showing to justify a request that this Court reach out to take this case when all the traditional criteria are lacking. Here, too, the government fails. The government's petition comes down to a single assertion: there is a "pressing need" for this Court to review this case, Pet. 24, because enjoining the Solomon Amendment "would undermine military recruit-

ment during a time of war," Pet. 10. This is the very proposition that the court of appeals rejected as inconsistent with the evidence.

The record reflects that the Solomon Amendment has never been about military necessity, which is why the military initially opposed it, why the sponsors justified it as retribution for disloyalty more than as a necessary measure to address a real problem when all other measures failed, and why JAG recruiting officers consistently marveled at the glut of highly qualified applicants, *see* App. 99a-100a, even when virtually all schools were denying them the parity of treatment the government now demands.

Indeed, the military interests served by enforcement of the Solomon Amendment are so insubstantial that it is hard to escape the conclusion that the only battle Congress and the Armed Forces are waging in this instance is a *Kulturkampf*. It is unclear whether this sort of pique could ever rise to the level of an "important question of federal law." Sup. Ct. R. 10(c). What is clear is that it does not qualify as an emergency.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

WARRINGTON S. PARKER, III
PETER E. GRATZINGER

HELLER EHRMAN LLP
333 Bush Street
San Francisco, CA 94104
(415) 772-6000

E. JOSHUA ROSENKRANZ*
SHARON E. FRASE
JEAN-DAVID BARNEA

HELLER EHRMAN LLP
120 West 45th Street
New York, NY 10036
(212) 832-8300

*Counsel of Record

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